

## **Fundamentals of Attendance Management: Part 2 of 2**

**By Marcel Faggioni & Jack Braithwaite\***

The focus of this instalment on the topic of Attendance Management, we shall focus on more aggressive means of managing attendance and on how to handle pervasive and out-of-control absenteeism subject to any accommodation obligations.

In recent years, the management of attendance has become a very complex legal minefield. The requirements on the employer have evolved in such a fashion that any possible mistake or slight oversight could end up costing an employer a fair amount of time, effort and money.

As an employer, you are often confronted with employees who provide “cryptic” medical notes that say very little in terms of the employee’s absence. Contrary to popular belief, as an employer, you do have the right to request additional medical information from an employee’s attending physician. The case law on this area of absenteeism has clearly established that the employer does have the right to request more information from the employee’s physician. Although, the employer can request information regarding the nature of the illness, possibility of accommodation of the illness and the prognosis for resumption of full duties, the employer may absolutely not request information that points to the diagnosis of the illness. The jurisprudence also establishes the positive obligation on the part of the employee to cooperate fully with the employer in obtaining the permissible medical information. In fact, in many arbitration cases where the employee has failed to provide the permissible information in order to facilitate the work accommodation, arbitrators have held that the employer is under no further obligation to continue the accommodation process.

In regards to workplace “accommodation”, the employer bears significant obligations towards the disabled employee. Much of these obligations emanate from the *Human Rights Code*. According to the *Code*, employees with disabilities must be accommodated to the point of undue hardship. From the Human Rights Commission and the courts’ vantage points, “undue hardship” imposes some formidable obligations on the employer. In some cases, the term “undue hardship” refers to an extensive array of workplace modifications that could possibly result in major financial consequences. In unionized workplaces, the duty to accommodate may have a double edge obligation – one for management and the other for the union. In some circumstances, the union may have to waive certain rights and provisions on the collective agreement in order to allow for the accommodation of one of its members. In many cases, this involves the waiving of seniority rights.

From an employer’s perspective, it is advisable that an employee absent for a protracted period of time not be allowed to simply waltz into work without formalizing a work reintegration program specifically designed for their circumstances. Employee’s who have been absent from work for a lengthy period should be obligated to provide

sufficient medical evidence that they are able to perform the core duties of their current position. The medical certificate should also indicate any need for work modification and most importantly the prognosis for a resumption of full duties. Once the employer comes in possession of the above information, then the employee (or union in a unionized setting) and the employer should develop terms for a customized gradual work reintegration process. It is important to be mindful that most often the employee who returns from a lengthy absence from work will require some type of re-orientation or familiarization to his/her work environment and job. This maximizes the successful reintegration of the employee.

On the other hand, the employer may necessarily have to be even more sensitive and vigilant in matters which raise issues of mental disabilities as a result of a recent case decided by the Human Rights Tribunal of Ontario (the "Tribunal"). In particular, the Tribunal identified a procedural duty to accommodate which included a responsibility on the part of the employer to engage in a full exploration of the nature of the disorder and to form an informed prognosis of the likely impact of the employee's condition in the workplace. The Tribunal found that a breach of the procedural duty to accommodate in itself constituted a form of discrimination warranting significant monetary damages and public interest remedies.

In this case, the employee was hired on probation as a Senior Test Analyst wherein the work was regarded as mission and safety critical as well as central to the functioning of the Armed Forces artillery with tight deadlines and stress factors. Within two days of commencing employment, the employee advised the company to be on the alert of any inappropriate behaviour on his part. Further, in a follow-up meeting on the fourth day of employment, the employee advised that he suffered bipolar disorder and provided a strategy to deal with the situation which may include taking time off work to avert a situation deteriorating from a pre-manic stage to full blown mania. On the eighth day of employment, the employee was terminated for failing to be able to perform the work for which he had been hired. During the course of the eight days of employment, the employee had entered a pre-manic phase which included exhibiting such symptoms as lack of attention to work; excessive socializing with co-workers; overly familiar e-mail message to his superior and manifestations of paranoia.

Further, although the Tribunal noted that the Employer had justifiable concerns regarding the employee's conduct as well as noted that the employee misrepresented the state of his health in the initial interview; misrepresented the number of sick leave days he had taken within the last twelve months and was a probationary employee, the Tribunal held that neither of the factual findings overrode the employer's obligation to fulfill the procedural dimensions of its obligation to make significant efforts to accommodate the employee. The Tribunal determined that those responsible at the company did not conduct an appropriate assessment of the situation to enable them to reach an informed conclusion that they could not accommodate the employee's disability without undue hardship. The Tribunal was specifically concerned that the company did not have workplace policies creating processes for and standards of assessment of persons with disabilities; that the Employer had no training in dealing with accommodation issues specifically arising out of a mental illness; that the Employer failed to engage in a fuller exploration of the nature of bipolar disorder; failed to explore the employee's own situation as a victim of bipolar disorder; failed to form a better informed prognosis of the likely impact of the employee's condition in the workplace;

failed to seek consultation with a lawyer; failed to address security concerns by not making contact with the Department of National Defence with held the contract.

As a result of the above, the Tribunal held that the Employer engaged in a form of discrimination contrary to the Code warranting a range of damages and public interest remedies. In consideration of the above, we are of the view that the Tribunal has sent a strong message that in terms of mental illness, the Employer can expect to carry a greater onus in assessing the situation to address accommodation needs and failing to put into place the proper procedural mechanisms will expose the employer to yet greater liability.

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